Supreme Court of the United States

OCTOBER TERM, 1948.

No. 187.

WATCHTOWER BIBLE AND TRACT SOCIETY, INC., GEORGE KELLY, MAURICE L. HARE and EARL W. HITCH,

Petitioners,

v.

METROPOLITAN LIFE INSURANCE COMPANY,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Petitioners seek a writ of certiorari, under section 237(b) of the Judicial Code, 28 U. S. C. section 344(b) [now title 28, United States Code, section 1257(3)] to the Supreme Court of the State of New York, County of New York, to review a judgment on the remittitur of the New York Court of Appeals (Petition, p. 1).

This controversy involves the asserted constitutional right of the individual petitioners and others of Jehovah's Witnesses to enter into and to canvass within apartment buildings owned and operated in New York City by respondent, despite the expressed objections of respondent and its tenants.

The action is for an injunction and a declaratory judgment. Brought as a class action by the Watchtower Bible and Tract Society, Inc. (the Society) and three individual

plaintiffs of those known as "Jehovah's Witnesses", on behalf of Jehovah's Witnesses generally, its purpose is to compel Metropolitan Life Insurance Company, the owner and managing landlord in possession of the New York City apartment house project known as "Parkchester", to allow Jehovah's Witnesses free access to the interiors of the Parkchester buildings and unrestricted use of the halls, stairways and elevators for the purpose of soliciting contributions and selling theological tracts.

The Opinions Below.

The issues were fully tried before Pecora, *J.*, sitting without a jury and the resulting record is perhaps more complete as to the organization and administration of the Society and as to the activities and practices of Jehovah's Witnesses than any that has hitherto been considered by this Court.[1] The opinion of the trial court,[2] with which the New York Court of Appeals noted its full agreement (R. 1026[3]), resolved the issues as follows:

1. Respondent, as landlord of the apartment houses where Jehovah's Witnesses sought to canvass the tenants, was entitled to exclude petitioners from the Parkchester buildings unless they obtained the consent of the tenants upon whom they wished to call;

2. The regulation issued by respondent as an expression of this policy was the act of a private landlord,

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[1] *Cf.* Mr. Justice Jackson, dissenting, in *Douglas* v. *Jeannette*, 319 U. S. 157, 169 (1943).

[2] Set out at pages 988-1001, of the record and reported at 188 Misc. 978, 69 N. Y. S. (2d) 385 (1947).

[3] This and similar references are to pages of the record.

applied to private persons, and hence beyond the reach of constitutional prohibitions;

3. *But even* if the validity of the regulation were to be tested by the constitutional principles applied to state and municipal laws by the decisions of this Court in Jehovah's Witnesses cases[4], the regulation is valid as applied to petitioners, for this Court has never granted to Jehovah's Witnesses the untrammeled right to enter multiple dwellings and to use the passageways, elevators and stairways for their purposes.

A judgment to this effect was entered (R. 54-57), and unanimously affirmed by the Appellate Division (R. 1013). Petitioners then appealed to the New York Court of Appeals, which also unanimously affirmed.

The opinion of the Court of Appeals[5] was confined solely to the conclusions of the trial court stated in paragraphs 1 and 3 above, the court observing that its determination made it unnecessary to consider the conclusion stated in paragraph 2. The Court of Appeals carefully examined the more relevant decisions of this Court, decided that they did not authorize or sanction the right which petitioners here assert, and added that petitioners should not be accorded such right, saying:

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[4] *Lovell* v. *Griffin*, 303 U. S. 444 (1938); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Jones* v. *Opelika*, 316 U. S. 584 (1942) [vacated and judgments reversed 319 U. S. 103 (1943)]; *Jamison* v. *Texas*, 318 U. S. 413 (1943); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U. S. 624 (1943); *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Marsh* v. *Alabama*, 326 U. S. 501 (1946); *Tucker* v. *Texas*, 326 U. S. 517 (1946).

[5] R. 1023-29, and reported in 297 N. Y. 339 (1948).

> "A narrow inner hallway on an upper floor of an apartment house is hardly an appropriate place at which to demand the free exercise of those ancient rights [of assembly, speech and worship]" (R. 1028).

In two important respects petitioners have misstated the holdings below:

I. *The regulation was not treated as a municipal ordinance.*

In an attempt to justify their insistence that they may assert here against respondent the same claims that would have been available in their defense if they had been convicted for violation of a municipal ordinance, petitioners assert that the lower courts treated respondent's regulation as if it were a municipal ordinance. They contend, therefore, that this Court likewise is bound to submit the regulation to the same searching constitutional scrutiny that would be directed to a legislative act (Petition, pp. 7-8, 17-18, 38). Neither the New York Court of Appeals nor any of the courts below so treated the regulation. No foundation exists in this record for such an assumption. This is a private controversy in which petitioners seek to enjoin respondent from excluding them from the interior common passageways of its private multiple dwellings in the absence of the consent of the tenants upon whom they wish to call. The trial court, affirmed by the Appellate Division, in its opinion expressly approved by the Court of Appeals (R. 1026), held the regulation to be the act of a private landlord governing the conduct of strangers within its building and, hence, not subject to the prohibitions of the Fourteenth Amendment. Having so decided, it additionally found that the policy adopted by respondent and expressed

in the regulation would not have violated those prohibitions, had they applied. Regarding the action in the most favorable possible light for petitioners, the Court of Appeals put aside the question of the applicability of constitutional principles and held that, assuming *arguendo* that the prohibitions of the Fourteenth Amendment did apply to the regulation, petitioners' rights of freedom of speech, press and worship had not been infringed. This contention having been decided adversely to petitioners, it was unnecessary for the Court of Appeals to consider whether those principles had any application to this controversy and that court expressly refrained from doing so (R. 1029). Nowhere did the New York courts hold that the regulation was, or was to be treated as, a municipal ordinance—in fact petitioners expressly admit that it is not (Petition, p. 5). Indeed, had there been no written regulation, the issues here would be exactly the same.

II. *There is here no "public streets" issue.*

Petitioners assure this Court that the Court of Appeals "blindly and summarily concluded" that constitutional safeguards do not extend to door-to-door distribution of literature on public streets (Petition, p. 20). The Court of Appeals concluded nothing of the sort. That issue was not before it, as it expressly recognized (R. 1028). What it did say was that petitioners could not invoke those safeguards, as delimited in the decisions of this Court, to provide a legal basis for their activities within the *interior* halls, passages and elevators of private apartment buildings (R. 1028). This dispute is localized to those interior areas, and the Court of Appeals so found, without in any way making a blanket condemnation of door-to-door activities such as petitioners profess to find in its opinion.

The Basic Issue.

Through a number of prior decisions of this Court, Jehovah's Witnesses have successfully established a considerable area of immunity from governmental action. Here, however, they have entered a new field. In this action they assert their constitutional rights, not against a governmental body, but against another private person—not as to a public place, but as to a private place.

There has been no general exclusion of Jehovah's Witnesses from Parkchester—even though petitioners extravagantly claim to have been "falsely arrested" and "deported" from the community (Petition, p. 5). Metropolitan has made no effort to put a halt to the activities of Jehovah's Witnesses upon Parkchester's streets and sidewalks. Long before the decision of this Court in *Marsh* v. *Alabama*,[6] which declared the right of Jehovah's Witnesses to enter such areas, respondent had raised no objection to their presence there, as the Court of Appeals has found (R. 1028).

Nor has respondent denied permission to Jehovah's Witnesses to make their calls at the apartments of individual tenants who have consented to such calls. To the contrary, it went to the trouble and expense of communicating with its tenants in Parkchester to find out which of them were willing to have such calls made (*infra*, pp. 14-16). It then informed the Society of the names and addresses of the consenting tenants and offered its services and cooperation in facilitating calls upon them by individual Jehovah's Witnesses (R. 1024).

Thus the basic issue of this controversy may be stated in relatively simple terms:

> May a person, merely by asserting that he is acting in accordance with his religious beliefs, enter

[6] 326 U. S. 501 (1946).

the private hallways of an apartment house over the objections of both landlord and tenants for the purpose of "preaching", *i. e.*, among other things, selling theological tracts and soliciting contributions?

The Facts.

A residential area of 129 acres in New York City known as Parkchester is the site of this dispute. Parkchester is comprised of 171 apartment buildings, varying from seven to twelve stories in height, and containing 12,272 separate apartments where live more than 35,000 persons (R. 256-57, 271). For the convenience of the residents, it contains shops, offices and other facilities which its size justifies (R. 956, 1023). Its size, however, is of no special significance in this case, for the argument of petitioners, if valid, would apply with equal force to a small apartment building or a modest rooming house, located in any city or hamlet of this country. Furthermore, when judged by its surroundings, Parkchester is dwarfed by the city of which it is a part[7].

Parkchester was built by respondent, a mutual life insurance company, as an investment for its policyholders' funds, and is managed directly and in every detail by respondent (R. 988, 1023). It was designed to accommodate families of moderate income, and the rentals are scaled accordingly (R. 956). Hence it lacks many of the facilities of "luxury" apartments, such as doormen and elevator operators (R. 274), who can inquire of the tenants whether a particular caller will be received.

The entire area of Parkchester is wholly owned by respondent, with the exception of three streets. Two of

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[7] Parkchester contains about 0.44% of the city's population and 0.41% of its land area.

these, complete with utilities, were built by respondent and turned over to the City of New York. All other streets are marked "Private Street" (R. 263-64, 273). Petitioners have conducted their activities without interference from respondent on all Parkchester streets, public or private (R. 1028). Here they ask this Court to enforce their claim that they are entitled to enter the apartment houses of Parkchester at will and to canvass the tenants as often as they wish (R. 1024).

History and Function of the Society: The origin of the Jehovah's Witnesses group, of which the individual petitioners are members, is comparatively recent. Its members have called themselves by that name only since 1931. Their beliefs and doctrine stem from the teachings and Biblical interpretations of Charles T. Russell, who in 1878 founded what he called "an organization of ministers" which has gradually evolved into the Jehovah's Witnesses sect[8].

In 1909 the corporate petitioner, Watchtower Bible and Tract Society, Inc., originally named Peoples Pulpit Association, was chartered under the Membership Corporations Law of the State of New York (R. 908-09). It is the governing body of the Jehovah's Witnesses (R. 8), and its membership is limited to forty men (R. 144), who receive their appointments from the president. But they take no active part in the direction of the Society's affairs (R. 144, 401, 605-06, 613).

The Society publishes material for distribution among the workers in the field and for further distribution under specified conditions to the public. These are issued *ex*

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[8] R. 66-69, and see generally STROUP, THE JEHOVAH'S WITNESSES (Columbia Univ. Press 1945), a careful study of the Witnesses, their origins and beliefs.

cathedra and individual Jehovah's Witnesses are vague as to their source, but the policies and doctrines so announced are accepted without question (R. 541, 560-62).

The output of such material by the Society is enormous. In the United States over three million 25¢ books, twenty million 5¢ booklets, hundreds of thousands of copies of the magazine "Watchtower" and "Consolation" (price to the public 5¢ per copy, $1 per year), and millions of advertising circulars, are annually printed, distributed and sold by the Society (R. 160, 166, 169, 395, 407, 410-14, 729).

Classification and Maintenance of Workers: There are now about 70,000 Jehovah's Witnesses, *all* of whom represent themselves and are represented by the Society as "ordained ministers" (R. 108, 347, 533-34). About six per cent of Jehovah's Witnesses are full-time workers; the others are part-time workers. The Society calls the full-time workers "special pioneers" and "pioneers"; they number from 4,200 to 4,500 persons (R. 344, 534). The remaining 65,000-odd Jehovah's Witnesses are "part time ministers" (R. 373, 534).

The President of the Society is maintained at "Bethel Home" and is provided with a drawing account of $24,000 subject only to his signature, to provide such cash as he may need for "various features of the work" while traveling (R. 721). The pioneers in the field receive commissions ranging as high as 400% from the sale of the Society's publications and special pioneers, in addition, are accorded a drawing account of $25.00 per month by the Society (R. 373, 689). "Part time ministers" receive no drawing accounts; their commissions approximate 25%; and they also engage in ordinary secular activities (R. 122, 168-69, 373, 537). As found by the trial court, amply supported by the record, all workers net a substantial profit from the dis-

tribution of the Society's books and booklets and "the Society is fully reimbursed by its ministers or workers for the literature which they distribute to the public and its gross income therefrom exceeds one million dollars annually, at least in recent years [*i.e.*, 1944 and 1945]" (R. 995).

"Preaching" by the Witnesses: In the field, by precept and example, Jehovah's Witnesses learn and practice methods of distribution which they sometimes liken to the invasion of a horde of locusts.[9] All these methods are termed "preaching of the Gospel," a term which they also apply to all their diverse activities, such as working at the Society's farms or in its printing plant, or presenting a petition at the doors of the Parkchester tenants charging respondent with misrepresentation (R. 864). The preferred methods of "preaching" consist of (1) street preaching, where the workers, bearing shoulder bags marked "Watchtower and Consolation 5¢", individually and in numbers solicit the passersby to purchase copies of the

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[9] "'They shall climb up upon the houses'. God's faithful servants go from house to house to bring the message of the kingdom to those who reside there, omitting none, not even the houses of the Roman Catholic Hierarchy, and there they give witness to the kingdom because they are commanded by the Most High to do so. 'They shall enter in at the windows like a thief.' They do not loot nor break into the houses, but they set up their phonographs before the doors and windows and send the message of the kingdom right into the houses, into the ears of those who might wish to hear; and while those desiring to hear are hearing, some of the 'sourpusses' are compelled to hear. Locusts invade the homes of the people and even eat the varnish off the wood and eat the wood to some extent. Likewise God's faithful witnesses, likened unto locusts, get the kingdom message right into the house and they take the veneer off the religious things that are in that house, including candles and 'holy water', remove the superstition from the minds of the people, and show them that the doctrines that have been taught to them are wood, hay and stubble, destructible by fire, and they cannot withstand the heat." From the Society's publication, *Religion*, p. 196 (Def. Ex. 5).

magazines and (2) house-to-house canvass (R. 102-03, 406). Supplementary to these methods, the Society uses other sales promotion devices, such as campaigns, special offers, quotas for workers, advertising by leaflets, radio broadcasts, sound trucks and portable phonographs (R. 159-60, 395-97, 433).

It is noteworthy that the Witnesses developed what they called a "special technique" during their canvassing at Parkchester, the declared object of which was to avoid giving respondent any basis for claiming "we were perhaps unreasonable at the door" (R. 501, 503).

Jehovah's Witnesses at Parkchester: In April, 1941, a female "pioneer" was assigned to work in Parkchester, denominated territory #324 (R. 439-41). For about sixteen days she canvassed in the apartment houses, and saw about 400 tenants (R. 451). Her testimony was that she found the tenants kind, although she found no one "definitely interested" (R. 441). During her sixteen visits there, the Parkchester guards requested her to leave on three different occasions (R. 450).

In October, 1941, another "pioneer" undertook to canvass the apartments and worked in Parkchester for a period of fourteen months, during the course of which she was requested to leave the buildings on six or seven occasions by the Parkchester guards (R. 457, 460). She made back calls on several persons who purchased publications from her and on such occasions she advised the guards that she was visiting a specific tenant and was permitted to continue (R. 467, 469). Covering on the average an apartment building each day, she finished by December, 1942 (R. 457, 464).

In February, 1943, special pioneer Kossak was assigned to Parkchester and worked there until November,

1944 (R. 474). In June of the same year special pioneer Fedorka and a group of Jehovah's Witnesses were also assigned to Parkchester (R. 475). Under the direction of the two special pioneers, Fedorka and Kossak, this group, working daily in pairs, succeeded in completely canvassing Parkchester's apartments for the second time in the period from June, 1943, to December, 1945 (R. 475).

Throughout the period, members of the group were requested to cease their activities on some forty occasions (R. 499). Nevertheless, by placing two men on the top floors working down and two men on the bottom floors working up, they were frequently able to finish an apartment building without interference from the guards (R. 977). Fedorka, who testified that he was stopped some fourteen times, "instructed the guard that as an ordained minister I was qualified to engage in house-to-house evangelistic services and that I was commanded to do so by the Most High God • • • and further I instructed the guard that I knew my legal constitutional rights, and I was guaranteed such rights to enter the Parkchester development to carry on my missionary activity there" (R. 497).

Meanwhile, in December, 1944, one of the petitioners, George W. Kelly, was appointed by the Society as unit servant of the South Bronx Unit, then composed of about 150 Witnesses (R. 524). "Special workers in Parkchester" were assigned to him by the Society (R. 526). Those special workers included special pioneers Hitch and Hare who also are petitioners here (R. 576).

Complaints by the Tenants: The individual Jehovah's Witnesses who testified at the trial were unanimous in portraying themselves as models of deportment when they made calls upon Parkchester tenants. While it is true

that there was none of the physical violence at Parkchester which often accompanies a visitation by Jehovah's Witnesses, there nevertheless was antagonism, quickly made known to the Parkchester management by telephone complaints from irate tenants (R. 771, 775-77).

The first official notice to Jehovah's Witnesses to discontinue their activities at Parkchester was given in 1944 by James P. McGannon, the Chief of the Parkchester Protective Division, a force of uniformed guards of whom three to seven are on duty at one time (R. 766-67). McGannon's request that the Witnesses discontinue their canvassing was ignored, and he was told that a religious message was being offered to the Parkchester tenants for thirty cents, "the actual cost of its printing" (R. 773). Later when McGannon intercepted another group of Jehovah's Witnesses, one of them argued his constitutional rights so persistently that McGannon suggested that the Society's counsel communicate with Metropolitan's attorney at Parkchester (R. 775).

There followed an exchange of letters in which both parties stood on their previously stated rights, *i. e.*, petitioners insisted that they were entitled to continue their activities in Parkchester, and respondent insisted that they must restrict their activities to tenants by whom they were expressly invited (R. 934-44).

Calls continued to be made into 1946 (R. 775). Complaints by tenants, which had been averaging five or six per month, increased, and by March, 1946, there were many complaints (R. 776). The Parkchester management finally decided that "the best thing to do was to get our tenants' view point" (R. 332). This resulted in the poll which petitioners in turn deprecate and excoriate.

Poll of the Tenants: On March 22, 1946, respondent sent a letter and return post card to each of its 12,200-odd tenants (R. 299, 317-18). The letter was scrupulously fair to Jehovah's Witnesses and stated the issue that had arisen in careful terms. Its evident purpose has been so distorted in the petition that it is reproduced in full in the margin.[10]

The letter asked each tenant to reply to the question, "Are you willing to have Jehovah's Witnesses visit you in your apartment?" The tenant was to fill in "yes" or "no", sign the post card (Def. Ex. H) and return it to the management. The response from the tenants was immediate and overwhelming. By April 3, 1946, nearly 8,000 post card replies had been received. Of these, 11 answered "yes", 7 were noncommital and 7,921 answered "no" (Def. Ex. R). Respondent promptly notified petitioners' counsel of this fact, furnished him with the names of the eleven willing

[10] "We have received numerous complaints from tenants with respect to the activities of Jehovah's Witnesses in Parkchester. For the information of some tenants who may not have received any calls from members of this organization, they go either individually or in groups from apartment to apartment, ringing doorbells, distributing literature, and expressing their religious views. If you desire more detailed information as to their activities, you may communicate with Lower Bronx Unit of New York Company of Jehovah's Witnesses, 1014 Southern Boulevard, New York, N. Y.

"As you may know there is a regulation (printed on the reverse side of this letter) in Parkchester generally prohibiting activities of this nature except within an individual apartment with the prior written consent or invitation of the particular tenant. We have felt it our duty to enforce, so far as possible, such a regulation in order to insure privacy and to prevent possible annoyance. We do not, however, desire that any such regulation be construed or be enforced in any way which might conceivably restrict anyone in the exercise of religious freedom, as guaranteed by the United States and New York State Constitutions. Any tenant willing to have Jehovah's Witnesses visit him in his apartment may do so.

"In order that each tenant may make known his wishes concerning calls by Jehovah's Witnesses, we are sending this communication and the enclosed card to all tenants. We should appreciate it if you would cooperate with us by stating your wishes on the card and mailing it at once. It is important that you act promptly. If you so desire, Jehovah's Witnesses will be permitted to visit you in your apartment." Def. Ex. G (R. 979-80).

tenants, and offered any needed cooperation to facilitate calls by Jehovah's Witnesses upon those tenants (R. 981-82).

On April 11, 1946—ten days after this action was commenced—respondent sent a second letter, likewise reproduced here,[11] to the one-third of its tenants who had not yet responded (R. 322-23; Def. Ex. M). It will be noted that this letter particularly advises all tenants *willing* to receive visits from Jehovah's Witnesses to return the post card with an affirmative answer, as the letter stated that Jehovah's Witnesses would be excluded from calling upon tenants who had not stated their willingness.

As the post card replies continued to come in, they were tabulated and checked against the tenant list (R. 318, 335). By May 9, 1946, according to respondent's records, a total

[11] "Since our letter of March 22, 1946, to our tenants regarding the activities in Parkchester of Jehovah's witnesses, court action has been commenced against us in which Jehovah's witnesses seek to compel access to the apartment buildings to call upon all tenants.

"More than two-thirds of the tenants have so far expressed their views as to such visits. Approximately 8,000 have stated they were not willing to receive visits from representatives of Jehovah's witnesses, while 11 have stated to the contrary. In the conviction that the wishes of these 11 should be met, the management has forwarded their names to the headquarters of Jehovah's witnesses with a statement that no objections will be made to calls upon them by representatives of Jehovah's witnesses.

"At the same time we believe that the wishes of the tenants who do not wish to receive such visits are entitled to equal respect. We intend, therefore, to oppose the court action brought against us in an effort to assure such tenants freedom from such unwanted calls.

"Some of you have not as yet stated your preference as to these visits. We particularly urge those who are willing to receive Jehovah's witnesses to notify us to that effect, as we shall carry out our regular policy of prohibiting solicitation, except where such notification or other written invitation is received. On the other hand, we also urge response from those who share the views of the majority, as the court will thus be informed of the will of the largest possible number of individual tenants.

"Will you, therefore, aid us in this matter by marking your preference on the enclosed post card and mailing it to us at once." Def. Ex. L (R. 983-84).

of 11,441 replies had been received, of which 74 were "repeats", 19 were noncommittal, and 28 were in the affirmative, leaving 11,323 in the negative (Def. Ex. R-1). Once again the names of the willing tenants were forwarded to petitioners (Def. Ex. I, N).

These post card replies were carefully checked during the course of the trial by a group selected by petitioners' counsel, and there was some minor dispute as to a few of the cards. The net result was, as the record clearly shows, that of the 12,200-odd tenants at Parkchester, not more than 28 expressed willingness to receive Jehovah's Witnesses, and over 11,000 expressly stated their unwillingness (R. 847-49).

Petitioners go to extreme lengths in their effort to discredit this poll—*e.g.*, by terming it "coerced" and a "pressurized plebiscite" (Petition, p. 15). There is not one word in the record to support these charges, or the equally extravagant assertion that the tenants answered in the negative because they feared eviction if they did otherwise (Petition, p. 15). The evidence is clear that respondent assumed the trouble and expense involved in polling its tenants not only in fairness to them, but also to Jehovah's Witnesses. The poll provided a convenient method of fairly ascertaining the wishes of both the majority and minority of the tenants, and of making it possible for respondent to observe the wishes of each group.

The Mass Invasion of Parkchester: Despite the pendency of this action to determine the rights of the parties, the New York Company of Jehovah's Witnesses was instructed by the Society to enter the apartment houses at Parkchester in force for the purpose of submitting a letter prepared by the Society and obtaining from the tenants signatures to a statement to the effect that the

tenant was willing for Jehovah's Witnesses to go from door to door in Parkchester (R. 584-85). Orders were issued and, without notice to Metropolitan, "well on the other side of 700" Jehovah's Witnesses appeared in Parkchester on Sunday morning, April 28, 1946 (R. 588).[12] In accordance with plan, four Jehovah's Witnesses entered into each of the 170 building entrances in Parkchester and, working in pairs, they called at each apartment in each building (R. 1757-66).

In the course of this mass invasion of Parkchester's apartment houses the signatures of approximately 1500 tenants[13] were obtained, which petitioners evidently regard as a considerable achievement (Petition, p. 15). The validity of this "poll", unlike that conducted by respondent, is seriously open to question. Whereas respondent's poll was made by mail, without any pressure of any kind upon the tenants, the Jehovah's Witnesses who solicited signatures to the petition were well instructed in the type of sales approach to be made. Employing the aggressive methods of persuasion so commonly associated with them, they freely charged respondent with misrepresentation.

As proof of the reliability of their canvass, petitioners point to the fact that less than ten tenants appeared at the trial to complain of the methods of Jehovah's Witnesses (Petition, p. 16). This overlooks the fact that the court rejected further testimony of this type from the tenants as cumulative (R. 822-39).

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[12] The use of large groups is not uncommon (R. 609-10); examination of Jehovah's Witnesses cases previous to this, however, indicates that this was the largest mass invasion yet made by them, the next largest, apparently, being the hundred-odd who invaded the town of Jeannette, Pennsylvania (pop. 16,000) on Palm Sunday, 1939 (*Douglas* v. *Jeannette*, 319 U. S. 157, 167-68 [1943]).

[13] Slightly more than 1700 signatures were obtained, but 240 did not, for one reason or another, appear to be signatures of tenants (R. 843-44).

Those tenants who did testify told of (1) misrepresentations by Witnesses—such as the assertion that 10,000 tenants had signed the petition (R. 829), (2) insistent arguments that the purpose of the petition was merely to protect the rights of Jehovah's Witnesses to free speech (R. 828-29) (in fact the petition did not state the willingness of the signer to have Jehovah's Witnesses call on *him*), and (3) such annoying techniques as making it impossible for the tenants to close the doors upon their unwanted callers (R. 800, 829). One tenant was induced to open her door by representations which led her to believe that her caller was from the post office (R. 824). Another tenant, in response to the argument that Parkchester was infringing on petitioners' rights, pointedly remarked that they were infringing on his right to be let alone, to which the Jehovah's Witnesses suggested that he put a "Please Don't Disturb" sign on his door (R. 784-85).

During this invasion 144 complaints were received by the Parkchester management (R. 779-80). Upon investigation McGannon found a group of Jehovah's Witnesses and observed them proffer the petition, charge Metropolitan with misrepresentation and persist in arguments with tenants in their efforts to obtain signatures (R. 778). When he requested the Witnesses to desist they refused (R. 779). McGannon even suggested that if the Jehovah's Witnesses would desist he would recommend to the management that the petition and letter be forwarded to the tenants by mail, but the suggestion was rejected (R. 861-62).

This flagrant violation of the rights of respondent and its tenants is, in itself, evidence of the lengths to which petitioners believe themselves entitled to go in order to serve their interests. Taken in utter disregard of the rights of others, it failed entirely of its purpose to discredit in any way respondent's poll.

Summary of Argument.

POINT I.

The prohibitions of the First and Fourteenth Amendments to the Constitution relating to the freedoms of speech, press and worship are not applicable to this controversy.

The discussion which follows under this point will be devoted to a question which the Court of Appeals referred to, but did not decide (R. 1029): Do the First and Fourteenth Amendments "have anything to do with rules made

by any dwelling proprietors, governing conduct inside their edifices"? There are two aspects to this question: (a) Do those Amendments apply directly to the activities of a private person such as respondent? and (b) If not, are they to be applied to the judgment of the courts below?

A. The First and Fourteenth Amendments are limitations upon the exercise of governmental power. They are inapplicable to the acts of private persons.

This Court has recently reaffirmed in *Shelley* v. *Kraemer*[1], the principle that the prohibitions of the First and Fourteenth Amendments are restraints directly upon the Federal and State governments, and not upon the action of private persons, saying:

> "Since the decision of this Court in the Civil Rights Cases, 109 U. S. 3, 27 L. ed. 835, 3 S. Ct. 18 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful."[2]

It will be considered *infra* whether the action of respondent is "discriminatory or wrongful". Here it is sufficient to point out that, whatever the nature or purpose of the action claimed to abridge constitutional rights, such action lies beyond the reach of the First and Fourteenth Amendments if it be that of a private person.

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[1] U. S. , 92 L. ed. 845 (16 Adv. Ops. 1948).

[2] 92 L. ed. (Adv. Op.) at 851-52; to the same effect, *Corrigan* v. *Buckley*, 271 U. S. 323 (1926); *Hodges* v. *U. S.*, 203 U. S. 1 (1906); *U. S.* v. *Harris*, 106 U. S. 629 (1883); *U. S.* v. *Cruikshank*, 92 U. S. 542 (1876).

There is no dispute here as to the status of respondent as a private person, or as to the fact that its regulation is not a municipal ordinance (Petition, p. 3). Such were the findings of the state courts (R. 988, 996, 1026, 1028).

While petitioners do not appear to dispute these findings, they attack them obliquely by insisting that the regulation and respondent's action in conditionally excluding Jehovah's Witnesses from the Parkchester buildings must be considered under principles of law which have hitherto been confined to review of governmental enforcement of state or municipal legislative action. Nowhere is the basis for this contention clearly set forth—unless in the argument, the error of which has already been demonstrated (*supra*, pp. 4-5), that the Court of Appeals decided the cases upon these principles and that this Court is obliged to follow suit.

Further evidence of this indirect attack upon the state court findings appears in the care with which petitioners have devised their argument to give the recurring impression that this case involves the application of governmental power to petitioners. Thus they claim (1) that Parkchester was authorized by and Metropolitan operates it by virtue of a "special enactment" of the New York legislature (Laws of 1938, ch. 25; Petition, p. 10, n. 2), (2) that Parkchester is a "community" (Petition, pp. 10-11, 17, 28, 34, 44-45) and (3) that the Parkchester Protective Division excluded Jehovah's Witnesses from the apartment buildings and "falsely arrested" them, "forcibly evicted" them from the interior passageways, and "deported them from the community" (Petition, pp. 5, 6, 12-14, 17, 40-42).

It is obvious from a reading of this "special enactment" that no governmental powers were conferred upon Metropolitan by Chapter 25 of the Laws of 1938 (New York

Insurance Law, sec. 84). This law, enacted to aid in relieving an emergency shortage of rental housing for persons of low and moderate income, was merely a *pro tanto* relaxation of certain restraints imposed by the state upon the investments of all life insurance corporations in New York State. It was not for the individual benefit of Metropolitan as petitioners would have the Court believe. In order to induce insurance companies to invest their private funds in such housing and to make the relaxation effective as a practical matter, the law provides that, after making the investment, the life insurance corporation shall "own, maintain, manage, collect and receive income from, sell or convey the land so purchased and the improvements thereon". None of the state's police power was thereby conferred upon those companies which invested their funds in such housing projects. Their powers of regulation are derived solely from their ownership and possession of the land and buildings and from their lease agreements with their tenants.

Nor can the existence of any governmental status be deduced from the amorphous label "community" by which petitioners invariably refer to Parkchester[3] (Petition, pp. 10-11, 17, 34, 44-45). The label implies no legal rights or duties and is here of no significance. Parkchester is not a "company town" or a village with the characteristics of a typical American town and no question is here presented with respect to "community" streets, sidewalks or other public or quasi-public places (R. 1028) as to which an invitation to the public might be implied from their "community" nature (*cf. Marsh* v. *Alabama,* 326 U. S. 501 [1946]; *Tucker* v. *Texas,* 326 U. S. 517 [1946]).

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[3] *Cf. Matter of Murray* v. *LaGuardia,* 291 N. Y. 320 (1943).

As to petitioners' third claim, respondent does not admit (*cf.* Petition, p. 41), nor does the record support, their assertions of "false arrest", "forcible eviction" and "physical and forcible deportations from the community" (R. 442-45, 447-48, 453-57, 462, 475-76, 497, 768-80, 853-61, 871-75). In view of the express concession by their counsel at the trial that petitioners neither alleged nor contended that physical force ever was used (R. 780), they scarcely can urge this contention now.

Their entries were civil trespasses, as the state courts found (R. 57, 1025-26). Metropolitan had the right of every owner in possession of private property to employ self-help to exclude those trespassers from its property as a civil matter[4] and its exclusions of Jehovah's Witnesses were not criminal arrests[5]. In so excluding them, it was acting only as a private property owner in its own and its tenants' interests, not as an instrumentality of the state or under color of state law or authority.

This is not a case where petitioners are being deprived of any constitutional rights through the operation or exercise of any governmental power. No true comparison can be drawn between a municipal government in its public functions and Metropolitan in its private function—the ownership and management of Parkchester. No true comparison exists between a municipal ordinance, a public act directly involving criminal punishment, and the private regulation of Parkchester which has no criminal sanctions. Neither respondent's regulation nor its enforcement thereof falls within the principles of constitutional law applicable to the review of governmental enforcement of municipal ordinances.

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[4] 1 RESTATEMENT, TORTS, secs. 77-78.

[5] *Cf.* NEW YORK CODE OF CRIMINAL PROCEDURE, sec. 185.

B. The judgment of the state courts did not constitute state action cognizable under the Constitution and did not convert the regulation or any of respondent's actions into acts of the state.

In the state courts petitioners argued that Parkchester is a "quasi-municipality" and that, accordingly, respondent in its operation of Parkchester is subject to the First and Fourteenth Amendments. That argument now has been abandoned in favor of the contention, based on *Shelley* v. *Kraemer*[6], and *Hurd* v. *Hodge*[7], that the judgment of the state courts constitutes state action subject to review by this Court under the First and Fourteenth Amendments. It becomes important, therefore, to examine what the state courts did in this judgment.

The form of the action brought by petitioners was (1) for a declaratory judgment that they have a constitutional right to call from door to door within respondent's apartment houses, that in so doing they were not trespassers and that the regulation as applied to Jehovah's Witnesses is invalid and void, and (2) for an injunction against respondent to prevent its interference with the exercise of their alleged constitutional right (R. 26-27). Respondent's answer was a general denial of the complaint, coupled with the prayer that the complaint be dismissed (R. 29-36).

On the trial of the action, respondent asked and was granted leave to amend its answer (R. 756). The effect of this amendment was that, in addition to the prayer for dismissal of the complaint, respondent joined in petitioners' request that the rights of the parties be declared by the court. This was proper under the state practice, which permits a defendant against whom a declaratory judgment

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[6] ..... U. S. ....., 92 L. ed. 845 (16 Adv. Ops. 1948).

[7] ..... U. S. ....., 92 L. ed. 857 (16 Adv. Ops. 1948).

is sought to join in the plaintiff's request that the rights of the parties be declared by the court.[8] It did not constitute a counterclaim or a prayer for any coercive relief.

The trial court dismissed the complaint, insofar as it sought an injunction, and declared the rights of the parties. Evidently because the judgment included this declaration, in addition to dismissing the complaint, petitioners now contend that it represents action of the State of New York, cognizable under the First and Fourteenth Amendments under the doctrine of *Shelley* v. *Kraemer* and *Hurd* v. *Hodge*.

The *Shelley* case and its companion case, *McGhee* v. *Sipes*, dealt with the validity of injunctive judicial enforcement by state courts of restrictive covenants against the lease, sale or transfer of property to, or occupancy by, non-Caucasians. In those cases Negroes were willing purchasers, from owners who were willing sellers, of properties upon which the Negroes desired to establish homes. Adjoining owners brought suit in the state courts to enjoin the Negro purchasers from occupying the properties in alleged violation of the restrictive covenants. In the *Shelley* case, although the Shelleys were occupying the property in question, the decree of the state court forbade their taking possession of it and divested title from them. In the *McGhee* case the purchasers were directed by the state court to remove from the property and were enjoined from using or occupying the premises in the future.

This Court reversed the judgments of the state courts. It held that, although the private restrictive covenants did not violate any rights guaranteed to the purchasers by the Fourteenth Amendment, such judicial enforcement of the covenants by the state courts was state action which denied

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[8] *Strobe* v. *Netherland Co.*, 245 App. Div. 573 (4th Dep't 1935).

the purchasers equal protection of the laws contrary to the Fourteenth Amendment.

Hurd v. *Hodge* involved the validity of injunctive judicial enforcement of a similar restrictive covenant by the *federal* courts. It was decided as a matter of federal public policy and under a federal statute (R. S. §1978, 8 U. S. C. §42). Though cited by petitioners, it adds nothing to this discussion.

These cases do not hold, as petitioners seem to contend, that every judgment of a state court in a non-constitutional controversy between private persons automatically converts that controversy into a constitutional one between the state and the loser. They were cases in which the plaintiffs successfully invoked the powers of the state courts in support of their claims to enforce restrictive covenants applicable only to non-Caucasians. There the state courts, "supported by the full panoply of state power," actively intervened where, except for that intervention, the purchasers would have been free to occupy the property without restraint.[9]

Here it was petitioners who invoked the judicial powers of the New York court when they attacked a regulation not directed to any particular group, religious or otherwise, and sought to compel respondent by injunction to suffer the entries of Jehovah's Witnesses upon its property. It was petitioners who sought to impose "the full coercive power of the government"[10] not only upon respondent but also upon the 11,000 Parkchester tenants who had individually stated their unwillingness that their privacy should be invaded by Jehovah's Witnesses.

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[9] *Shelley* v. *Kraemer, supra*, at 854-55.

[10] *Id.* at 855.

The state court's injunction in the *Shelley* case was a coercive restraint imposed by the state to deny to the Negro purchaser, on the grounds of race or color alone, the enjoyment of property rights in premises which he had acquired from a willing grantor. In the instant case the declaratory judgment is not founded in any element of discrimination, and does not deprive petitioners of equal protection of the laws. It deals solely with respondent's regulation and its application to the activities of canvassers and solicitors within respondent's apartment houses, without regard to the nature of the canvassers' business or their race, creed or color.

In its declaratory provisions as well as in its dismissal of petitioners' complaint, the judgment in this action has the force of a final judgment and, with respect to the issues presented, considered and determined by the trial court, is *res judicata*.[11] That is true of the final judgment in every civil action. Finality of a judicial determination alone cannot be the test of the applicability of constitutional principles in a civil action. If it were, the Fourteenth Amendment would apply in this case even if there were no declaratory provisions in the judgment. In dismissing petitioners' complaint the trial court necessarily passed upon and determined the identical issues which were presented by the application for a declaration of the jural relations of the parties. The finality of the judgment and its effect as *res judicata* are not determinative of whether the judgment is state action cognizable under the Fourteenth Amendment.

What petitioners are now asserting is that any judgment in this action except one favorable to them deprives them

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[11] New York Civil Practice Act, sec. 473; 5 Carmody's N. Y. Practice (2d ed. 1933), sec. 1974.

of freedom of speech, press and worship without due process of law and is state action prohibited by the Fourteenth Amendment. This reduces to the contention that the Fourteenth Amendment is not only a prohibition against state action of a particular character, but also a mandate to the state to compel all private persons within its jurisdiction to conform to constitutional standards in their private conduct and relationships with other private persons. In view of the adherence of this Court in *Shelley* v. *Kraemer, supra,* to the principle enunciated in the *Civil Rights Cases,* such is not and never has been the law; the unbroken line of authority is to the direct contrary (*supra,* p. 21).

Summary: Neither Metropolitan nor Parkchester is an instrumentality of the State of New York; none of respondent's acts partook of or were under color of state law or authority; the Parkchester regulation was a private expression of Metropolitan's policy as a landlord; and the declaratory judgment in this action is immune from attack under the Fourteenth Amendment. If, indeed, any invasion of petitioners' rights and those of other Jehovah's Witnesses took place—a question to be examined in the following Point—it was "individual invasion of individual rights" which is not the subject of the Fourteenth Amendment.[12] It is submitted that for this reason alone, this Court should deny the petition for a writ of certiorari.

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[12] See *Civil Rights Cases,* 109 U. S. 3, 11 (1883). See also CURTIS, LIONS UNDER THE THRONE (1947), 257.

POINT II.

The decisions in *Marsh* v. *Alabama* and *Tucker* v. *Texas* are not inconsistent with the judgment below. The action of Metropolitan in conditionally excluding Jehovah's Witnesses from the interior passageways of its apartment houses does not violate any of their legal rights.

Petitioners assert (Petition, pp. 2, 16-17, 21) that the decision of the New York Court of Appeals—which they label "alien doctrine" (Petition, p. 20)—is in direct conflict with this Court's holdings in *Marsh* v. *Alabama,* 326 U. S. 501 (1946), and *Tucker* v. *Texas,* 326 U. S. 517 (1946). The opinion of the Court of Appeals gave careful consideration to these cases and concluded that their holdings do not "go nearly so far as appellants would have us go here" (R. 1028).

The *Marsh* and *Tucker* cases presented the question whether a state, consistently with the First and Fourteenth Amendments, could impose criminal punishment on a person who undertook to use the streets and sidewalks of a privately-owned town contrary to the wishes of the owners for the purpose of distributing theological tracts.[13] In each a Jehovah's Witness was convicted for violation of a state trespass statute. As a necessary consequence, a constitutional question was raised as to the limitations imposed by the First and Fourteenth Amendments on the power of the *state.*

This Court reversed the convictions in both cases. It did not question the state court determinations that the

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[13] 326 U. S. at 502.

streets and sidewalks of those privately-owned towns were not "dedicated", but pointed out in the *Marsh* case that the determination as to "dedication" meant merely "that the corporation could, if it so desired, entirely close the sidewalk and the town to the public."[14] It decided that where "the town and its shopping district are accessible to and freely used by the public in general", a Jehovah's Witness was privileged to go upon a sidewalk of that town to distribute religious literature. The foundation of this holding was the principle that the rights of an owner in his property become increasingly circumscribed to the extent that the owner "for his advantage opens up his property for use by the public in general",[15] a principle which the Court illustrated by decisions under the commerce clause that the rights of private owners of bridges, ferries, turnpikes and railroads must yield to the public interest where general public use of them has been invited.

In the *Marsh* and *Tucker* cases, the Court found that the owners of those towns had so submitted their privately-owned streets and sidewalks to use by the general public as to constitute, as a matter of fact, *pro tempore* dedication of them to the public, a dedication which could not be revoked as to any specific members of the public except by exclusion of the public generally. From this it would appear that the Jehovah's Witnesses had infringed no property rights of the owners by going upon the streets and sidewalks and using them for distribution of religious literature, even against the prohibitions of the owners. In such circumstances, the Court held that application of the states' "trespass after warning" statutes to their activities violated the prohibitions of the Fourteenth Amendment.

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[14] 326 U. S. at 505.

[15] 326 U. S. at 506.

Implicit within this determination are echoes of the Court observing in *Hague* v. *C. I. O.*[16]:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens."

And in *Schneider* v. *Irvington*[17]:

> "• • • the streets are *natural and proper places* for the dissemination of information and opinion; and one is not to have the exercise of his liberty of expression in *appropriate places* abridged on the plea that it may be exercised in some other place." (Emphasis added.)

This traditional principle was recognized in *Marsh* and *Tucker* where this Court decided that streets and sidewalks which have been left open to general public use constitute, not only ways for travel, but also, by ancient and immemorial use and custom, public forums of discussion and channels of communication. Whoever comes upon them for those purposes, while they remain open to use by the public with the owner's consent, does so in his own right. Consequently, the statutes of Alabama and Texas, as applied in the *Marsh* and *Tucker* cases, constituted deprivations of Jehovah's Witnesses' freedoms of press and worship only

[16] 307 U. S. 496, 515 (1939). This language was recently reaffirmed in *Saia* v. *New York*, ... U. S. ....., 92 L. ed. 1087, 1090 (18 Adv. Ops. 1948). A similar idea is expressed in *Jamison* v. *Texas*, 318 U. S. 413, 416 (1943) and in *Cantwell* v. *Connecticut*, 310 U. S. 296, 308 (1940).

[17] 308 U. S. 147, 163 (1939). See also *Prince* v. *Massachusetts*, 321 U. S. 158, 174 (1944) (dissent); *Valentine* v. *Chrestensen*, 316 U. S. 52, 54 (1942); *Thornhill* v. *Alabama*, 310 U. S. 88, 106 (1940).

because those statutes made criminal the orderly conduct of their activities at places where they had a complete right to be, as against the wishes of the owners, because of the public nature of those places and the public use to which the owners had submitted them.

Petitioners insist that the *Tucker* case, unlike the *Marsh* case, involved a prohibition of house-to-house distribution, rather than a prohibition of distribution on the streets and sidewalks (Petition, pp. 21-22). But the Court said in the *Tucker* decision (326 U. S. at 520):

> "The only difference between this case and *Marsh* v. *Alabama* is that here instead of a private corporation, the Federal Government owns and operates the village. This difference does not affect the result. Certainly neither Congress nor Federal agencies acting pursuant to Congressional authorization may abridge the freedom of press and religion safeguarded by the First Amendment."

Examination of the record in the *Tucker* case shows beyond question that, disregarding the governmental character of the landlord, the two cases are substantially alike. From that record (fols. 24-26, 34-35) it appears that, under leases from the Federal Public Housing Authority, the tenants had exclusive possession, not only of the houses, but also of the surrounding plots and paths abutting on the streets and sidewalks of the village. No landlord-tenant agreement was shown limiting the general property rights of the tenants in those areas. The boundary of the tenants' exclusive property—the doors of the apartments in the instant case—was located where those plots abutted on the sidewalks. The Authority was without right to exclude anyone from those plots or houses.[18] The only property in

[18] 1 RESTATEMENT, TORTS, sec. 162.

the village over which it had any right of exclusion was the streets and sidewalks. Thus both the *Marsh* and *Tucker* cases were decided by an identical process of reasoning, to the effect that so long as the streets and sidewalks were left open by the owner for use by the public in general, a temporary easement existed in favor of all members of the public.

In the instant case, although Metropolitan owns and controls streets and sidewalks which are marked "Private Street" (R. 263-67, 273) it has never sought to limit in any way the activities of Jehovah's Witnesses on those streets and sidewalks (R. 1028). It has sought merely to limit indiscriminate canvassing within each apartment house.

The common passageways, stairways and elevators in Metropolitan's apartment houses have never been thrown open to the public, are not places of assembly, and have never been considered as public forums for debate of current questions, channels of public communication or places for canvassing or solicitation. The record is devoid of any evidence that the owner of Parkchester ' for his advantage opens up his property [the interior passageways of the Parkchester buildings] for use by the public in general" (326 U. S. at 506). Hence, they cannot be deemed "appropriate places"[19] for such activities. Finally, unlike the owners of the towns in the *Marsh* and *Tucker* cases, Metropolitan has assiduously respected the right of each tenant to receive such canvassers and solicitors as the tenant may desire. Neither the *Marsh* nor the *Tucker* case is like the instant case and neither is controlling here; both are entirely consistent with the judgment below.

The action of Metropolitan in conditionally excluding Jehovah's Witnesses is in harmony with the existing au-

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[19] *Schneider* v. *Irvington*, 308 U. S. 147, 163 (1939).

thorities. On this question *Martin* v. *Struthers,* 319 U. S. 141 (1943), is pertinent. The decision in that case contains many signposts which have been followed by Metropolitan in the instant case and which point a way out of the difficult social problems inevitably arising from the intrusion of Jehovah's Witnesses.

The city of Struthers, Ohio, passed an ordinance absolutely prohibiting any person engaged in distributing handbills, circulars and other advertising matter, from ringing the doorbell or otherwise summoning the inmate of any residence to the door for the purpose of receiving such handbills, circulars or other advertising material. Thelma Martin, a Jehovah's Witness, was arrested and convicted for violation of the ordinance. On appeal, this Court reversed.

The majority opinion declared that the question whether door-to-door canvassing shall be permitted "has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community". The Court found that the ordinance controlled nothing but the distribution of literature and that it subjected the distributer to criminal punishment for annoying a person upon whom he called, even though such person in fact might be glad to receive the literature. Balancing the asserted civil rights of Jehovah's Witnesses and the rights of the householder to receive the literature against the interest of the municipality which, by the ordinance, sought to protect the interests of its citizens whether the particular citizen wanted that protection or not, the Court held the ordinance to be an unconstitutional exercise of police power. It pointed out, however (pp. 147-8):

> "Traditionally the American law punishes persons who enter onto the property of another after

> having been warned by the owner to keep off. • • • The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributers of literature may lawfully call at a home where it belongs—with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributers from the home."

It appears from the *Martin* case that while the constitutional rights of Jehovah's Witnesses may survive a municipal ordinance which operates as a blanket exclusion order, those rights must yield to the contrary wishes of the person in possession, for if he states his unwillingness to receive them, Jehovah's Witnesses have no right to enter upon his property to seek to make him listen.

While respondent has not placed signs at the doors of its buildings warning canvassers and solicitors to keep off, the effect in the case of Jehovah's Witnesses is exactly as if such signs were there. They have been given notice, both orally and in writing, to desist from canvassing within the buildings (Petition, pp. 12-14). In addition, the unwillingness of the tenants to be disturbed by Jehovah's Witnesses was overwhelmingly expressed in the results of the impartial poll conducted by Metropolitan among

its tenants (R. 317-30, 847-50, 1024-25). It is of significance that this poll was not a "determination of the community" whether any tenant might receive Jehovah's Witnesses. Each response registered "the will of the individual master of each household" with respect only to visits of Jehovah's Witnesses in *his* apartment (R. 979-85; Def. Exs. G through N). Except for a handful of tenants who stated their willingness to receive them, the effect was as if the tenants had posted "Do Not Disturb" signs on their apartment doors. As to those who stated a willingness for Jehovah's Witnesses to visit them in their apartments, Metropolitan not only furnished their names to the Society, but also offered its services in facilitating such visits (R. 981-82, 985, Def. Exs. K and N).

In the last analysis, the authorities upon which petitioners rely to establish "constitutional rights" were founded in two basic considerations: (1) Were Jehovah's Witnesses conducting their activities in an *appropriate place?*[20] and (2) Regardless of the appropriateness of the place, was the prohibition of their practices imposed by an *appropriate agency?*

For reasons of public safety, peace and protection from fraudulent solicitations, state and municipal governments, in some instances, have adopted statutes and ordinances prohibiting solicitors, peddlers, canvassers, etc. from *all* places within the limits of a municipality unless licensed to enter by an administrative officer endowed with absolute discretion to admit or exclude them.[21]

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[20] As Mr. Justice Black noted in *Martin* v. *Struthers, supra,* at p. 143 "No one supposes, for example * * * that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities."

[21] *Lovell* v. *Griffin,* 303 U. S. 444 (1938); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940).

In others, similar prohibitions, enacted for similar reasons, have been limited to restricting their use of the public streets, sidewalks and parks within the municipal limits.[22]

In these situations, this Court has held that streets, sidewalks and parks which have been left open to general public use, have immemorially been considered *peculiarly appropriate places* for the interchange of ideas; and that, consequently, enactments of state or municipal governments potentially restrictive of the exercise of speech, press and religious expression *in such places* violate the Fourteenth Amendment. Governmental restraints upon such activities in such manifestly appropriate places can be justified only by proof that they are so conducted as to create a clear and present danger of riot or disorder,[23] or interference with traffic upon the public streets[24] or other immediate threat to public safety, peace or order.[25]

No court has ever held that the privately-owned land between a public street and the front door of a private individual dwelling is an inherently appropriate place for the conduct of the Witnesses' activities contrary to the wishes of the owner. In some cases, however, municipal governments have absolutely prohibited Jehovah's Witnesses' house-to-house activities within the municipal limits without regard to the election of the individual private owner to admit or exclude them from his property, or they have enacted taxing and discretionary licensing ordinances potentially capable of accomplishing the same re-

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[22] *Saia* v. *New York*, ... U. S. ...., 92 L. ed. 1087 (18 Adv. Ops. 1948); *Hague* v. *C. I. O.*, 307 U. S. 496 (1939); *Schneider* v. *Irvington*, 308 U. S. 147 (1939); *Jamison* v. *Texas*, 318 U. S. 413 (1943); *cf. Marsh* v. *Alabama*, 326 U. S. 501 (1946).

[23] *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).

[24] *Cox* v. *New Hampshire*, 312 U. S. 569 (1941).

[25] *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

sult.[26] All these were held unconstitutional infringements of Jehovah's Witnesses' freedom of speech, press and religion.

Fundamental to this line of decisions was the Court's recognition of the traditional principle of law that admittance or exclusion of strangers from his property in the first instance is the prerogative of the possessory owner for the time being, not that of the state or municipal government. Until the owners or possessors of those places have prohibited the Witnesses' entries upon them, a state or municipal government is an *inappropriate agency* to prohibit or burden their use of such places for dissemination of ideas. The only *appropriate agency* of prohibition is the possessory owner. But if, for example, a Jehovah's Witness were to disregard the warning of a householder to keep away from his door the state or municipality might then become, at the owner's request, the appropriate agency to enforce that prohibition.

Summary: The instant action presents circumstances not heretofore before this Court. Neither historically nor by any extension of realities can the interior common passageways of a Parkchester apartment house be deemed, by their nature, appropriate market places of ideas. Those spaces never have been submitted to general public use (R. 998-99, 1028). They are Metropolitan's strictly private property for use only by Metropolitan, the tenants and the *bona fide* invitees of the tenants. Here also, not only because of its possessory ownership of those spaces, but also

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[26] *Follett* v. *McCormick*, 321 U. S. 573 (1944); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Douglas* v. *Jeannette*, 319 U. S. 157 (1943); *Jones* v. *Opelika*, 319 U. S. 103 (1943); *Martin* v. *Struthers*, 319 U. S. 141 (1943); *Largent* v. *Texas*, 318 U. S. 418 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *Irvington, supra; cf. Tucker* v. *Texas*, 326 U. S. 517 (1946).

because of the nature of the relationship between landlord and tenants in matters affecting their safety, peace, quiet, comfort and convenience within an apartment house, Metropolitan is an eminently appropriate agency to regulate or restrict the use of those inner hallways by Jehovah's Witnesses and other uninvited, indiscriminate door-to-door callers for their self-serving, annoying and potentially dangerous activities. Here the prohibition is conditional, not complete. If the tenants wish to receive Jehovah's Witnesses, they are perfectly free to have them enter.

In sum, under the principles which have emerged from decisions of this Court in these various Jehovah's Witnesses cases, no legal right of petitioners is curtailed by their conditional exclusion from the interior hallways of apartment buildings (inappropriate places for their activities) by respondent (an appropriate agency). The petition should be denied.

POINT III.

Metropolitan's regulation, as applied here to Jehovah's Witnesses, is authorized by law and by its leases with the Parkchester tenants. It is reasonable and has been reasonably applied.

The factual situation presented in this case is unparalleled by any heretofore before this Court. Jehovah's Witnesses now ask the Court to review this case and to declare that they have the absolute right, defeasible by no one, to go through private apartment houses at will, and as often as they wish, even though (a) the owner has told them to keep out, (b) the tenants upon whom they wish to call have declined to receive them and (c) they are strangers in law and in fact to both landlord and tenants.

Respondent privately owns, operates and maintains all the Parkchester buildings (R. 988, 1023; Petition, p. 10). It is not an absentee landlord, but has retained possession of all parts of those buildings except the apartment space expressly granted to its tenants by leases (R. 36-51, 271, 764-67). Unquestionably it is the possessory owner of all the entrances, hallways, stairways and other common passageways within the buildings, subject only to the tenants' rights of ingress and egress. Incidental to its possessory ownership, supervision and control of those common passageways, it has the right to admit or exclude whomever it chooses, subject only to the rights of the tenants as expressed in the lease agreements[27].

The right petitioners assert is not derived from any express invitation; only one such invitation from a tenant was shown at the trial (R. 580-81). Nor have they any implied invitation. The state courts so found (R. 998-99, 1026, 1028; *cf.* Petition, pp. 24-28). Petitioners insist, however, that the regulation is unauthorized and unreasonable (Petition, pp. 22-28, 32-36).

Paragraph Fourth of the standard form of Parkchester apartment lease (R. 36-51) provides (R. 38-39):

> "The Tenant shall observe and comply with and the Tenants agree that all persons dwelling in or visiting in the demised premises shall observe and comply with the rules and regulations printed on the back hereof, and such other and further rules and regulations as the Landlord may from time to to time deem needful and prescribe for the safety, care and cleanliness of the building, and the preservation of good order therein, as well as the comfort,

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[27] Cooley, Torts (4th ed. 1932), secs. 247-52; see also Holmes, The Common Law (1881), 206-46; 1 Restatement, Torts, secs. 158, 163, 164; 3 Bl. Comm.* 209.

quiet and convenience of other occupants of the building."

Number 15 of the Rules and Regulations printed on the back of the lease, and thus made part of it, further provides (R. 51):

> "15. The Landlord reserves the right to rescind or change any of the foregoing rules and to make such other rules and regulations from time to time as may be deemed needful for the safety, care and cleanliness of the premises and for securing the comfort and convenience of all the Tenants."

Pursuant to this lease authority, Metropolitan prescribed the regulation which embodies Metropolitan's policy of excluding from the common passageways of the Parkchester buildings callers, not specifically invited by the tenants, who go indiscriminately from door to door of the tenants' apartments (R. 19-20, 277-78, 1023-24). The courts below have found that the regulation is authorized by the lease, serves the purposes specified by the lease without undue or onerous burden, and is reasonable (R. 55-57, 996, 1001, 1025-26, 1029). In the words of the trial court (R. 996):

> "The regulation here attacked is a private one adopted by defendant in its capacity as the landlord of the Parkchester apartment houses. It is designed to increase the safety, care and cleanliness of the houses, to preserve good order therein and to promote the comfort, quiet and convenience of their occupants. The right to prescribe it was given to defendant by the provisions of its written leases with its tenants, hereinabove quoted."

Likewise the New York Court of Appeals explicitly stated (R. 1029):

> "We hold that this sort of regulation, as here written and applied to plaintiffs, was not unreasonable."

Because of its size and the concentration of a large number of persons in a relatively small area, Parkchester offers a unique attraction to all types of persons, well intentioned or otherwise, who want to canvass the tenants or solicit charitable or other contributions from individual residents. It affords a tempting target for the salesman, mendicant or colporteur interested in achieving maximum coverage at a minimum of effort and time. If a rigorous policy against such canvassing were not adopted, the residents of Parkchester would be subjected to a steady stream of callers which could not be adequately controlled by the five to ten guards who are on duty at any one time (R. 766-67). As the testimony shows, the uninvited caller creates a constant problem, despite the activities of the Protective Division (R. 281-91, 768-71, 781, 797-98).

The regulation designed to cope with this problem applies only to a limited class of persons, canvassers and solicitors, whose presence is annoying when the entry is only occasional and most exasperating when frequent and persistent. It applies to persons who are usually transients (as special pioneers, petitioners here, are) and who may or may not be what they seem. The places within which their activities are inhibited are narrowly defined. Of all of the Parkchester area, consisting of apartment buildings, commercial space, streets, sidewalks and parks, they are conditionally excluded only from the interiors of the residential buildings.

Nor is the regulation concerned with the subject matter of their communications to the tenants. It does not involve censorship by respondent nor does it absolutely prohibit

dissemination of information. It is a reasonable regulation of activities within a particular place.

No absolute bar to visits by canvassers and solicitors upon the Parkchester tenants is imposed by the regulation. Whenever a tenant, desiring to receive their visits, expresses that desire, they are free to call upon him (R. 1028). The only activities inhibited by respondent are uninvited, indiscriminate calling from door to door. The requirement that canvassers obtain permission from Parkchester's management or exhibit a written invitation from a tenant before visiting that tenant, fulfills the intent and purpose of Metropolitan and its tenants, expressed in the lease, of making Parkchester a safe, quiet and comfortable residential area. This is the only practical identification device by which the interests of all—respondent, its tenants and the canvassers—can be preserved within that intent and purpose.

Unlike the owner of an individual home who, as a result of the greater spaces between individual houses, can himself control all annoying disturbances except those of such enormity as to be breaches of the peace which the police will put down, the apartment house dweller must and does look to his landlord as the most effective and appropriate means of securing him from unwanted intrusions upon his privacy. The Parkchester tenants are no exception and "open house" to canvassers will prejudice Metropolitan's relationships with its tenants.

While individual Jehovah's Witnesses may conceive themselves as carrying out fundamental scriptural duties by calling upon Parkchester residents and some may have no commercial objectives, the disturbing effect of their door-to-door activity upon the quiet, comfort and convenience of all tenants, is at least as great as that of the commercial canvasser.

Though at first visits by Jehovah's Witnesses were few in number, complaints began to be made by the tenants to the management and the complaints mounted in frequency and intensity as the number of visits by the Witnesses increased (R. 771, 775, 776, 777). The tenants were annoyed, and they soon made their annoyance felt because they expected Metropolitan to put a stop to the visits. At the time of the mass invasion of Jehovah's Witnesses on April 28, 1946, this annoyance was so evidenced by the numerous complaints from the tenants that it was necessary to add two telephone operators to handle calls (R. 779-80).

In brief, the right of a landlord to exclude strangers from his property and of a tenant to be free from intrusions upon his privacy is the same when asserted at Parkchester as when asserted with respect to a single apartment house, hotel or rooming house. Every individual tenant at Parkchester has the same right to be free from annoying callers as any other apartment dweller. And Metropolitan is as much entitled to protest the burdening of the hallways of its buildings with an easement in favor of Jehovah's Witnesses as is the individual owner of the most modest multiple dwelling. Here the record is ample and persuasive that the regulation is necessary and desirable in the proper and orderly operation of Parkchester and has been reasonably applied to petitioners.

POINT IV.

The regulation has been enforced without discrimination.

With studied deflection of emphasis, petitioners assert (Petition, p. 12) that "no concerted effort was made by respondent effectively to enforce the regulation by eviction

of callers from the buildings or deportation from the community over the course of the years except as to Jehovah's Witnesses". That assertion misstates the facts shown by the evidence in this case. The record establishes that, in the instances which came to the attention of the Parkchester management, the regulation was enforced, the canvassers and solicitors were requested to leave, and, with the exception of Jehovah's Witnesses, the request was observed (R. 286, 287-88, 290-91, 768-71, 781). They so little observed the request that, they claim, they made two complete canvasses of the buildings through the use of the so-called "special Parkchester technique" and a third complete canvass through mass invasion (*supra*, pp. 11-12, 16-18).

In a fruitless effort to demonstrate that discrimination was practiced against them (Petition, pp. 37-38), petitioners called as witnesses upon the trial a few tenants who testified to isolated instances of visits from various religious and philanthropic organizations. There was no evidence that Metropolitan knew of these instances, for the tenants uniformly testified that they were not annoyed by these visits and did not complain to the Parkchester management (R. 356-57, 365, 371). Since less than ten of the guards are on duty at one time, in the whole area of Parkchester (R. 766-67), the management is forced to rely in large measure upon telephone complaints from its tenants to learn that canvassers are at work in the apartment buildings.

Admittedly, the no-canvassing policy was relaxed during the war years when various organizations affiliated with the Civilian Defense Volunteer Organization requested permission to make door-to-door canvasses (R. 283, 286-87, 771, 794-96). These were carried forward as a rule by Parkchester's patriotic tenants, with committee heads selected

from among their numbers, on behalf of such nonsectarian public causes as war bond drives, Red Cross and U. S. O. (R. 286, 289-90, 794). Under these special circumstances, permission by Metropolitan to its tenants and representatives of the Civilian Defense Volunteer Organization to go from door to door for purposes directly related to the war effort constituted no discrimination against Jehovah's Witnesses and any others respondent sought to exclude. Certainly, Jehovah's Witnesses could not qualify, and made no effort during the war to qualify, for any purpose related to the defense of this country.[28]

With that single exception, every effort has been made to enforce the letter and spirit of the regulation, and it has been brought to bear not only upon Jehovah's Witnesses but upon all who attempted to go from door to door. There has been no discrimination against Jehovah's Witnesses and they have not been denied equal protection.

Conclusion.

This is not a case, like so many that hitherto have come before this Court, where Jehovah's Witnesses have been the victims of oppression and persecution and the full power of the state or municipality has been arrayed against them. Here they have taken the offensive. Denying that their alleged rights can ever be subordinated either to the rights of property owners or to the desires of their harassed listeners to be left alone, they now seek to enlist the aid of the state to force open the doors of every apartment house against the will of its owner.

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[28] See *Falbo* v. *U. S.*, 320 U. S. 549 (1944).

Throughout this litigation respondent has asked petitioners to state whether there are any areas in which they do not conceive themselves to be entitled, by constitutional right as well as divine mandate, to carry out their activities. If petitioners were to answer this question—which they have so far declined to do—in the only way consistent with their beliefs and objectives, their answer would reveal to this Court the novel and dangerous implications of the claim here asserted.

It is important to emphasize that what petitioners here ask of this Court is not freedom of belief, but absolute freedom to act as their beliefs dictate.[29]

The most casual student of this militant sect will soon observe that they are no respecters of the property or rights of others. It is not to be hoped that their own sense of self-restraint will prove an effective curb on their activities. They are working inexorably toward their goal of complete freedom to go wherever their inclinations may lead them, to enter upon private property and to force the unwilling to listen. If they are successful in this action they will have come dangerously close to their goal.

Before this Court grants this petition and agrees to review this case, respondent urgently asks that it ponder well the sociological as well as the legal implications of a reversal of the state courts. If this Court throws open the doors of Parkchester to Jehovah's Witnesses, what doors can thereafter be barred to them? Will any buildings be privileged to turn them away—even rooming houses, hotels, office buildings or apartment houses with doormen? And if these doors are forced open for Jehovah's Witnesses, must

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[29] "Thus the [Fourteenth] Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be." *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-04 (1940).

they not likewise be opened for others claiming a like status under the guise of freedom of speech, press or religion?

The decisions in *Marsh* and *Tucker* by no means left the private landowner at the mercies of Jehovah's Witnesses. He will become so, however, if this case is reversed, for then the words of the book "Religion" (quoted *supra*, p. 10), likening Jehovah's Witnesses to locusts entering the home, will acquire an uncomfortably real significance.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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